

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

T-MOBILE USA, INC., a Delaware
corporation,

Plaintiff,

v.

HUAWEI DEVICE USA, INC., a Texas
corporation; and HUAWEI TECHNOLOGIES
CO. LTD., a China company,

Defendants.

NO. C14-1351 RAJ

MOTION OF DEFENDANT HUAWEI
DEVICE USA, INC. TO DISMISS
COMPLAINT UNDER FED. R. CIV. P.
12(b)(6)

NOTE ON MOTION CALENDAR:
November 21, 2014

ORAL ARGUMENT REQUESTED

MOTION OF DEFENDANT HUAWEI DEVICE USA, INC.
TO DISMISS COMPLAINT
No. C14-1351 RAJ

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1 Defendant Huawei Device USA, Inc. (“Huawei USA”), by and through its undersigned
 2
 3 counsel, hereby moves this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss
 4
 5 Counts I, II, and IV¹ of the Complaint because Plaintiff, T-Mobile USA, Inc. (“T-Mobile”) has
 6
 7 failed to state a claim upon which relief can be granted.
 8

9 **INTRODUCTION**

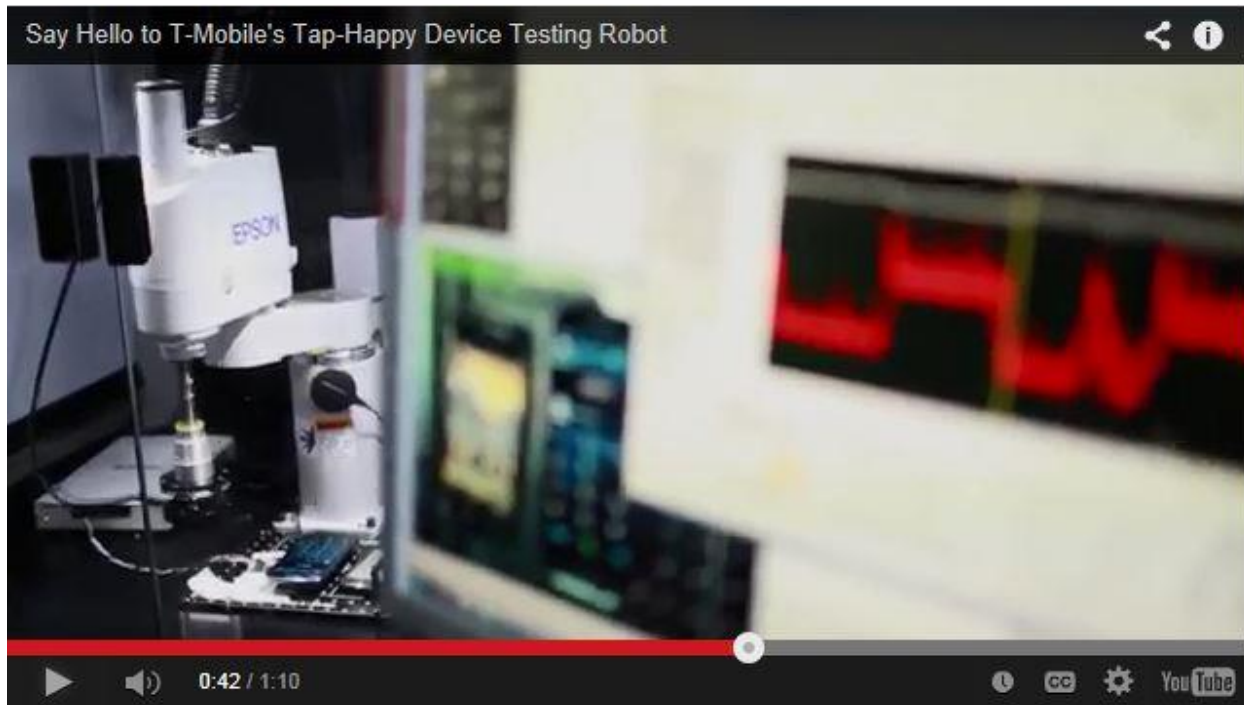
10
 11 T-Mobile did not “invent” its robot. Rather, it purchased a robot from Epson. T-Mobile
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 13 did not keep its robot a secret. Rather, it published details about the robot and its programming
 14
 15 in patent applications, and T-Mobile featured the robot in videos posted on YouTube. All this
 16
 17 was done well before Huawei even had access to T-Mobile’s lab and the robot. T-Mobile’s
 18
 19 Complaint fails to identify any information that was confidential or had independent value by
 20
 21 being confidential, requirements for a trade secret under Washington law.
 22

23 The T-Mobile robot that is allegedly a trade secret was actually in the public domain
 24
 25 years before Huawei even had access to T-Mobile’s lab and the robot. Three years before
 26
 27 Huawei had access to T-Mobile’s robot, T-Mobile began allowing patent applications to publish
 28
 29 and disclose details of the robot and its operating system. In total, at least three patent
 30
 31 applications published details of the robot. T-Mobile also demonstrated the robot in operation in
 32
 33 a YouTube video/advertisement months before Huawei had access to the lab.² The video shows
 34
 35
 36

37 ¹ T-Mobile alleged Count III of the Complaint against Huawei Technologies Co. Ltd. and not
 38 against Huawei USA. As a result, Huawei USA does not discuss Count III in this motion to
 39 dismiss; and a dismissal of Counts I, II, and IV would result in a complete dismissal of the action
 40 against Huawei USA.
 41

42 ² David Beren, *T-Mobile Shows Off Device Testing Robot, Employees Do the Robot Dance*, Tmo
 43 News (Sept. 13, 2012), <http://www.tmonews.com/2012/09/t-mobile-shows-off-device-testing-robot-employees-do-the-robot-dance/>. The video is also available on YouTube at
 44 <http://www.youtube.com/watch?v=mv69ZxKOFsw>.
 45

1 the robot tapping icons on a smartphone and reveals other aspects of the robot. The following
2
3 screenshot shows that the robot is not even made by T-Mobile but is actually an Epson product:
4



26 T-Mobile's trade secret claim fails for a number of reasons. T-Mobile concedes, as it
27 must, that the industry used robots to test devices and that the components of its robot were in
28 the public domain. T-Mobile is left to allege that there were "secret" parts of its robot; yet, the
29 Complaint is devoid of any description of this secret information that Huawei employees
30 allegedly took. This level of pleading fails to inform Huawei or the Court of the purported trade
31 secrets that are the crux of the dispute; and there is no identification of what T-Mobile alleges is
32 trade secret versus what it must acknowledge was publicly known. Courts require plaintiffs
33 alleging trade secret violations to state with specificity what is believed to be secret. This is for
34 good reason. To permit vague or conclusory allegations about purported trade secrets invites a
35 fishing expedition for information around which the plaintiff will attempt to fashion a claim. T-
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1 Mobile's sweeping claims of proprietary information cannot be reconciled with its public
2 disclosures. Not only does T-Mobile not include this critical information in its Complaint, but it
3 has also ignored Huawei's repeated requests to identify the allegedly secret information.
4
5

6
7 The Complaint omits other information that is highly relevant. T-Mobile knew Huawei
8 was building its own robot. Building smartphones that meet quality control standards was in
9 both companies' best interests. In fact, to assist Huawei with its project, T-Mobile gave samples
10 of the robot finger tips to Huawei. T-Mobile also answered questions from Huawei's robot
11 development team. *See* Dkt. 1, Compl. ¶¶ 43-44. The cooperation ended at a point, and Huawei
12 ultimately decided to use a robot made by a third party—not the Epson robot that T-Mobile used.
13
14

15
16 Not only has T-Mobile publicized its robot on YouTube and the Internet, but it also has
17 filed multiple patent applications on the specific features of the robot and its operation. The
18 patent applications were published before and during Huawei's relationship with T-Mobile, but
19 well before Huawei ever had access to the "secret" robot. The vague references in the Complaint
20 to T-Mobile's patents fail to identify a single bit of information that remained confidential after
21 the patent applications were published. Nonetheless, T-Mobile alleges that Huawei somehow
22 misappropriated "secret" information.
23
24

25
26 In May 2013, when T-Mobile first raised issues described in the Complaint, Huawei
27 responded immediately. First, Huawei stopped using its robot even though it was independently
28 developed. Second, Huawei gave T-Mobile access to the relevant Huawei employees for
29 interviews and even produced more than 20,000 pages of information requested by T-Mobile.
30
31 *See id.* ¶¶ 3, 52, 68-71. This information was provided under the companies' agreements and
32 also a new non-disclosure agreement specifically for the investigation, with explicit agreement
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1 that the voluntary disclosure was subject to Rule 408 of the Federal Rules of Evidence.³ *See id.*

2
3 ¶¶ 3, 12. Despite Huawei's voluntary cooperation and the confidentiality protections, T-Mobile
4
5 took the fruits of the confidential investigation and used them in the Complaint. *See, e.g., id.*
6
7 ¶¶ 52, 68-71.

8
9 Not only does T-Mobile's Complaint fail to state a claim for the numerous reasons (*e.g.*,
10
11 preemption under the Washington Uniform Trade Secret Act) articulated below, but the omission
12
13 of material facts is misleading and the use of Huawei's confidential information is reckless, at
14
15 best. T-Mobile's overreaching Complaint should be dismissed in its entirety.

16 17 **CRITICAL FACTS RELEVANT TO THE MOTION TO DISMISS**

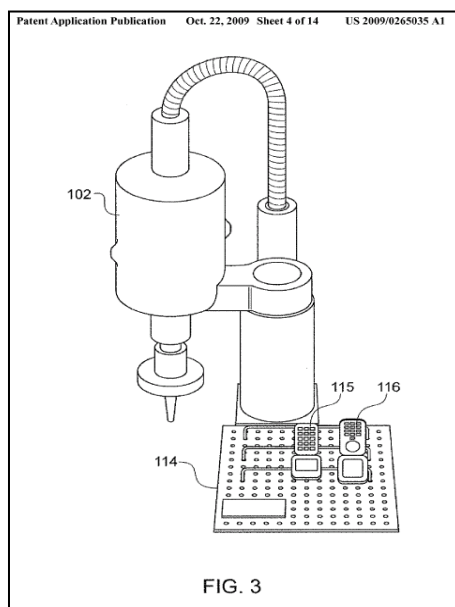
18
19 T-Mobile and Huawei signed a Supply Agreement on June 2, 2010. Dkt. 1, Compl. ¶ 35.
20
21 It was not until late 2012 that Huawei was first given access to T-Mobile's lab where the robot
22
23 was located. *Id.* ¶ 41. The alleged incidents of wrongdoing occurred in May 2013—photographs
24
25 taken of the robot occurred on May 14, 2013 and the measurement of the "end effector" took
26
27 place on May 29, 2013. *Id.* ¶¶ 48, 58. The Complaint also refers to an alleged taking of
28
29 "sequence files operating software," but there is no allegation of what these files are or who
30
31 allegedly took them. *See id.* ¶¶ 61-62.

32
33 T-Mobile began developing a robot in 2006, which it began using in late 2007. *Id.* ¶¶ 10,
34
35 29. T-Mobile not only posted a YouTube video showing its robot in operation but also published
36
37
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39
40 ³ The Court should strike the following paragraphs of the Complaint to the extent that T-Mobile
41 relies on information disclosed by Huawei USA in the context of settlement negotiation: Dkt. 1,
42 Compl. ¶¶ 3, 15-18, 44, 45, 50, 52, 53, 56-60, 65-72, 82, & 100-105. *See, e.g., Kelly v. L.L. Cool*
43 *J.*, 145 F.R.D. 32, 40 (S.D.N.Y. 1992) (granting defendant's motion to strike portions of a
44 complaint that referenced settlement discussions under Rule 408 as impermissible to show fault
45 and thus immaterial and potentially prejudicial).

1 details about the design and functionality of its robot more than two years before Huawei was
 2 initially granted access to the robot.
 3

4
 5 T-Mobile has filed multiple patent applications with the U.S. Patent & Trademark Office
 6 (“USPTO”) seeking to protect its robot and its functionality. The first of these applications to
 7 publish was patent application serial no. 12/239,271, entitled “Robotic Device Tester.” Ex. 1.
 8
 9 This application, which was published on the USPTO’s website as Publication No. US
 10 2009/0265035 on October 22, 2009, disclosed the robot in detail. *Id.* Figure 3 from the
 11 published patent application is reproduced below:
 12
 13
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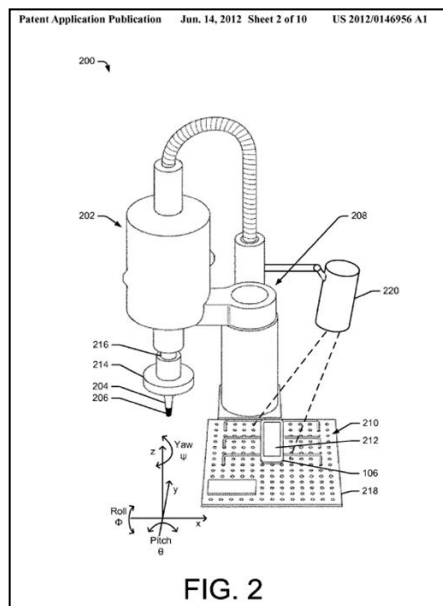


34 *Id.* at Figure 3. This published patent application also disclosed details about the file structure of
 35 the configuration files and a “cross-functional flowchart that illustrates a method according to
 36 which a device may be tested, including generation of a configuration file and performance of
 37 the test.” *Id.* ¶ 27. The Complaint, however, does not define the “sequencing files” that it
 38 alleges Huawei took, nor is this a term of art. Huawei and the Court consequently have no
 39 indication of what T-Mobile’s coined phrase means. Nevertheless, there can be no dispute that
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 41
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1 this published patent application fully describes the operating software for T-Mobile's robot. *See*
 2
 3 *id.* ¶¶ 26-27.

4
 5 The USPTO published patent application serial no. 12/830,142, entitled "Switching
 6
 7 Matrix and Test Platform," on January 5, 2012. Ex. 2. The application was published as
 8
 9 Publication No. US 2012/003982. *Id.* This application describes in detail how T-Mobile
 10
 11 engineers envisioned testing the radio frequency signals in devices (such as smartphones) during
 12
 13 performance of functions "such as making voice calls, transmitting and receiving data (messages,
 14
 15 videos, music, etc.)." *Id.* at Abstract. This functionality is precisely what T-Mobile uses its
 16
 17 robot to test.

18
 19 On June 14, 2012, the USPTO published patent application serial no. 12/964,427, entitled
 20
 21 "Touch Screen Testing Platform." Ex. 3. This application, which was published on the
 22
 23 USPTO's website as Publication No. US 2012/0146956, also described the robot in detail. *Id.*
 24
 25 Figure 2, reproduced below, is illustrative:



Id. at Figure 2.

1 This published patent application also describes in detail the “test protocol module” that
 2 commands the movements of the robot as it tests the device. *See, e.g., id.* ¶¶ 25-34, 41. Through
 3 these commands, the robot engages the touch screen and is used to activate the controls of the
 4 device, simulating actual use of the device. The Complaint fails to acknowledge that the
 5 command protocols for T-Mobile’s robot were in the public domain (and not eligible for trade
 6 secret protection) before Huawei had access to T-Mobile’s lab.
 7

8 All aspects of the robot are revealed in the published patent applications or in the
 9 YouTube video. The actual robot, made by Epson (as clearly shown in the YouTube video), is
 10 commercially available. The Complaint fails to describe the “unique and cutting-edge
 11 technology” that was embodied in the photographs of the robot that the Huawei employee
 12 allegedly took with his smartphone. Dkt. 1, Compl. ¶ 22. There is no indication that there is
 13 anything confidential about the outside appearance of the robot. Similarly, the “end effector” is
 14 disclosed in the published patent applications and in the YouTube video.
 15

16 **STANDARD OF REVIEW**

17 Dismissal is proper under Rule 12(b)(6) “if it appears beyond doubt that the plaintiff can
 18 prove no set of facts to support his claims.” *Manhardt v. Fed. Judicial Qualifications Comm.*,
 19 408 F.3d 1154, 1156 (9th Cir. 2005). While in reviewing the adequacy of the complaint the
 20 Court must accept all well-pleaded allegations as true, the “[f]actual allegations [in the
 21 complaint] must be enough to raise a right to relief above the speculative level, on the
 22 assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atl.*
 23 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also South Ferry LP, No. 2 v. Killinger*, 542
 24 F.3d 776, 782 (9th Cir. 2008). In other words, “[t]o survive a motion to dismiss, a complaint
 25

1 must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible
 2 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (internal quotation omitted).

3
 4 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain a
 5 “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.
 6 Civ. P. 8(a)(2). This pleading standard “does not require ‘detailed factual allegations,’ but it
 7 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, at
 8 678. Moreover, the tenet that a court must accept all factual allegations in a plaintiff’s complaint
 9 as true does not apply to legal conclusions; and threadbare recitals of the elements of a claim,
 10 supported by mere conclusory statements, do not suffice. *Id.*

11 ARGUMENT

12 **I. T-MOBILE HAS FAILED TO STATE A CLAIM FOR TRADE SECRET MISAPPROPRIATION**

13 A plaintiff asserting a trade secret claim bears the burden of “proving that legally
 14 protectable secrets exist.” *Boeing Co. v. Sierracin Corp.*, 108 Wn. 2d 38, 49, 738 P.2d 665
 15 (Wash. 1987). The Washington Uniform Trade Secret Act defines a trade secret as:

16 . . . information, including a formula, pattern, compilation,
 17 program, device, method, technique, or process that:

18 (a) Derives independent economic value, actual or
 19 potential, from not being generally known to, and not being readily
 20 ascertainable by proper means by, other persons who can obtain
 21 economic value from its disclosure or use; and

22 (b) Is the subject of efforts that are reasonable under the
 23 circumstances to maintain its secrecy.

24 RCW 19.108.010(4). The Court should dismiss T-Mobile’s Complaint here because T-Mobile
 25 failed to plead the existence of a trade secret, that its trade secret was not “readily ascertainable
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1 by proper means,” and that it undertook reasonable efforts to maintain the secrecy of its trade
 2
 3 secret.
 4

5 **A. T-Mobile Failed to Identify Any Trade Secret with Sufficient Particularity to**
 6 **Withstand Dismissal**
 7

8 T-Mobile’s statement of the alleged trade secret is an insufficient, generic statement that
 9
 10 captures virtually *every component* of its robot. T-Mobile alleges:
 11

12 The trade secrets owned by T-Mobile and improperly acquired by
 13 Huawei include information and know-how relating to the design,
 14 assembly, and operating methods of the T-Mobile testing robot –
 15 including specifications, source code, component selection, and
 16 operating instructions – as well as other non-public elements of the
 17 robot technology, and proprietary combinations and
 18 implementations of the robot.
 19

20 Dkt. 1, Compl. ¶ 80. This statement is wholly insufficient to state a claim for trade secret
 21
 22 misappropriation, and the Court should dismiss Count I for failure to state a claim.
 23

24 In *Baden Sports*, this Court granted defendant’s motion to dismiss a similar claim due to
 25
 26 failure to sufficiently plead that its product “could plausibly be a trade secret.” *Baden Sports*,
 27
 28 *Inc. v. Wilson Sporting Goods Co.*, No. C11-0603, 2011 WL 3158607, *2 (W.D. Wash. July 26,
 29
 30 2011). The Court explained that, in its complaint, “Plaintiff fails to identify any component of
 31
 32 its [product] that is a trade secret.” *Id.* The Court further criticized the description provided of
 33
 34 the product:
 35

36 This vague description does not provide sufficient detail. It fails to
 37 identify what components of the device are claimed or whether it is
 38 the combination of the components that is claimed. . . . Because
 39 Plaintiff fails to plead the details about its [product] that make it a
 40 trade secret, Plaintiff[] does not meet the pleading requirements for
 41 this claim.
 42

43 *Id.* The Court should similarly dismiss T-Mobile’s trade secret claim for failing to plead what its
 44
 45 claimed trade secret is.

Courts are consistently wary of insufficiently pleaded trade secret claims, such as the one in this case, viewing them as improper litigation tactics:

Experience has shown that it is easy to allege theft of trade secrets with vagueness, then take discovery into the defendant's files, and then cleverly specify whatever happens to be there as having been trade secrets stolen from plaintiff. A true trade secret plaintiff ought to be able to identify, up front, and with specificity the particulars of the trade secrets without any discovery.

telSPACE, LLC v. Coast to Coast Cellular, Inc., No. 2:13-CV-01477 RSM, 2014 WL 4364851, *5 (W.D. Wash. Sept. 3, 2014) (quoting *Jobscience, Inc. v. CVPartners, Inc.*, 2014 WL 1724763, *2 (N.D. Cal. 2014)) (quotation marks omitted). Accordingly, this Court ordered the plaintiff to “provide sufficient specificity for its . . . trade secret claims.” *Id.* Before any trade secret claim can proceed, T-Mobile should, at a minimum, be required to provide sufficient specificity for its alleged trade secret. *See Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 722, 328 P.3d 905 (Wash. Ct. App. 2014) (“The alleged unique, innovative, or novel information must be described with specificity and, therefore, ‘conclusory’ declarations that fail to ‘provide concrete examples’ are insufficient to support the existence of a trade secret.”) (citation omitted). Washington courts clearly require pleading a claim for trade secret with particularity exceeding that which T-Mobile provided in its Complaint in this case.

T-Mobile's Complaint supplies insufficient detail to determine what the claimed trade secret is. T-Mobile's claim extends to every component of the robot, capturing elements that are public knowledge and failing to identify with any level of detail what elements are allegedly protected trade secrets. T-Mobile failed to plead the existence of any trade secret with the requisite level of detail, and the Court should, accordingly, dismiss Count I.

B. T-Mobile Had No Trade Secret Because It Had Already Disclosed Publicly All Such Information

1. T-Mobile Disclosed Its Robot Fully Via Its Patent Disclosures

In patent applications published in 2009 and 2012, T-Mobile disclosed the elements of its robot over which it now claims trade secret protection. “In a motion to dismiss, a Court may take judicial notice of documents attached to or referenced in the complaint without converting the motion into one for summary judgment where the authenticity of the documents are not in dispute.” *In re Wet Seal, Inc. Securities Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007). T-Mobile references its patents and patent applications for its robot in its Complaint: “Several aspects of the robot are patented or patent-pending” Dkt. 1, Compl. ¶ 10. Moreover, patent applications and patents are subject to judicial notice, which allows for judicial consideration at any stage of the proceeding. *See* Fed. R. Evid. 201(d). Courts routinely take judicial notice of the contents of patents and of patent filing dates. *See, e.g., St. John’s Univ. v. Bolton*, 757 F. Supp. 2d 144, 154 (E.D.N.Y. 2010) (judicial notice of content of patent); *Pollution Denim & Co. v. Pollution Clothing Co.*, 547 F. Supp. 2d 1132, 1135 n.11 (C.D. Cal. 2007) (judicial notice of patent filing date). The patents and associated applications are, therefore, squarely before the Court in deciding this motion to dismiss.

The disclosures T-Mobile made in its patent applications are important because they eviscerate T-Mobile’s ability to claim trade secret protection. The USPTO publishes patent applications, eighteen months after they are filed, thereby disclosing the contents of the applications to the public. 35 U.S.C. § 122(b); *see also* Restatement (Third) of Unfair Competition § 39 cmt. F (1995) (“Information that is generally known or readily ascertainable through proper means . . . by others to whom it has potential economic value is not protectable as

1 a trade secret. Thus, information that is disclosed in a patent or contained in published materials
2 reasonably accessible to competitors does not qualify for protection [as a trade secret].”). This is
3 in part a natural result of the fact that patent applications necessarily must be specific enough to
4 meet the “enablement requirement,” which allows someone to make and use the invention, and
5 must also include a description of the inventor’s preferred method, or “best mode,” of using the
6 claimed invention. 35 U.S.C. § 112(a); *see also Sitrick v. Dreamworks, LLC*, 516 F.3d 993, 999
7 (Fed. Cir. 2008). The “best mode” requirement ensures that a patent applicant cannot obtain a
8 patent while at the same time keeping secret what he believes is the best implementation of the
9 invention.
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11 In the years preceding the alleged misappropriation of T-Mobile’s alleged trade secret in
12 May 2013, T-Mobile filed three separate patent applications for its robot: (1) on September 26,
13 2008, T-Mobile filed its Robotic Device Tester patent application US 2009/0265035, now patent
14 US 8,761,938, which bears a publication date of October 22, 2009, Ex. 1; (2) on July 2, 2010, T-
15 Mobile filed its Switching Matrix and Test Platform patent application US 2012/0003982, which
16 bears a publication date of January 5, 2012, Ex. 2; and (3) on December 9, 2010, T-Mobile filed
17 its Touch Screen Testing Platform patent application US 2012/0146956, which bears a
18 publication date of June 14, 2012, Ex. 3. These patent documents amount to a prior, voluntary
19 public disclosure by T-Mobile of each component of the robot that is even remotely identified by
20 T-Mobile as potentially being a misappropriated trade secret. As a result, T-Mobile has not
21 identified anything not already disclosed, and the Court should dismiss T-Mobile’s trade secret
22 claim.
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1 While T-Mobile's Complaint is replete with vague references to alleged
 2 misappropriation, the section of the Complaint entitled "Huawei's Theft of Trade Secrets," Dkt.
 3 1, Compl. ¶¶ 41-72, identifies two potential misappropriations, neither of which can involve a
 4 trade secret given their disclosure in T-Mobile's patent applications. First, T-Mobile alleges
 5 misappropriation of the "end effector." *Id.* ¶¶ 54-60. The existence and purpose of the end
 6 effector, however, is described in the T-Mobile patent applications, which were published well
 7 before the alleged misappropriation. *See, e.g.*, Ex. 3, US 2012/0146956 ¶ 30 (published June
 8 2012) ("The robotic device tester 200 may include a robot 202 that is configured to control
 9 movement of an arm with a tip 206 using a robotic arm 208"); *id.* ¶ 32 ("In some embodiments,
 10 the robot 202 is configured to move the arm 204 and tip 206 in six degrees of freedom using the
 11 robotic arm 208 . . ."); *see also id.* Fig. 2; Ex. 1, US 2009/0265035 at Fig. 3 (published October
 12 2009). The tip of the end effector is described in great detail, Ex. 1, US 2009/0265035 ¶ 85 ("a
 13 force sensor may sense force at the tip of the robotic arm and provide the reading to the
 14 processor, e.g., robot controller PC"), as is the material comprising the tip, Ex. 3, US
 15 2012/0146956 ¶ 27 ("The tips may be synthetic pads (e.g., rubberized, plastic, etc.), that are
 16 moveably controlled by the robotic device tester"); *id.* ¶ 31 ("In some embodiments, the tip 206
 17 may be formed using a synthetic material (e.g., rubber, polymer material, etc.), such as a
 18 conductive material that enables detection by the touch screen device 106 when the tip engages
 19 the touch screen 212.").

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 39 Second, T-Mobile alleges misappropriation of its sequencing files: "On information and
 40 belief, Huawei employees accessed and sent proprietary sequencing files via email to others at
 41 Huawei." Dkt. 1, Compl. ¶ 62. T-Mobile has raised this conclusory allegation despite lacking
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any factual basis upon which to properly bring such a claim. Such general allegations, based “on information and belief,” are insufficient to state a claim. *Taylor v. Reliance Standard Life Ins.*, No. C10-1317JLR, 2011 WL 62142 (W.D. Wash. Jan. 7, 2011) (explaining that such “general allegations are not sufficient to withstand a motion to dismiss”); *see also In re Lilley*, No. 10-91078C-13D, 2011 WL 1428089, *3 (Bankr. M.D.N.C. Apr. 13, 2011) (explaining that where plaintiffs “couch their conclusory recitals in terms of ‘information and belief’” that amounts to “an inadequate substitute for providing detail as to why the element is present in an action”).

Not only is the claim baseless, but T-Mobile also disclosed information regarding the computer programs that control its robot in the three previously mentioned patent applications. These patent applications fully describe the functionality of the robot, including the programming that controls the movement of the robot arm and the radio frequency operations of the device. *See, e.g.*, Ex. 1, US 2009/0265035 at ¶¶ 76-82, 85; Ex. 2, US 2012/0003982 at ¶¶ 22-23, 54-62; Ex. 3, US 2012/0146956 at ¶¶ 23-34, 40 & Figs. 4, 5. The publication of these programs, well before the alleged misappropriation, extinguishes any possible trade secret protection.

2. T-Mobile Also Disclosed Elements of Its Robot in a Video It Released in September 2012

Not only should the Court take judicial notice of the patent applications, but the Court should also take judicial notice of the video T-Mobile posted on its website to show off its robot (<http://www.tmonews.com/2012/09/t-mobile-shows-off-device-testing-robot-employees-do-the-robot-dance/>) on September 13, 2012, eight months prior to the alleged misappropriation of trade secret via photographing the robot or taking the end effector. Dkt. 1, Compl. ¶¶ 48, 54-55. Judicial notice is proper because the video “can be accurately and readily determined from

1 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). T-Mobile
 2 produced and released the video, which T-Mobile maintains, to this day, on a T-Mobile hosted
 3 webpage that is publicly available.
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 7 The video shows the components of the robot, including the size of various components
 8 like the end effector. It also shows that Epson manufactured the robot, demonstrating that it was
 9 not manufactured internally by T-Mobile and that T-Mobile cannot claim any trade secret
 10 protection with respect to that component. *See, e.g., Eng’g Network Int’l, Inc. v. Lucent*
 11 *Technologies, Inc.*, 178 F. App’x 721, 722 (9th Cir. 2006) (finding no misappropriation where
 12 plaintiff “failed to demonstrate its ownership over the alleged trade secrets”). Moreover, the
 13 video makes it readily apparent to the naked eye that the photographs taken in the testing
 14 laboratory by the Huawei employee do not disclose anything not already disclosed in this video,
 15 which had been released *eight* months prior to the date the photographs were taken. *Compare*
 16 [http://www.tmonews.com/2012/09/t-mobile-shows-off-device-testing-robot-employees-do-the-](http://www.tmonews.com/2012/09/t-mobile-shows-off-device-testing-robot-employees-do-the-robot-dance/)
 17 [robot-dance/](http://www.tmonews.com/2012/09/t-mobile-shows-off-device-testing-robot-employees-do-the-robot-dance/) with Ex. 4, Photographs (referenced at Dkt. 1, Compl. ¶ 48); *see also* Ex. 5,
 18 Comparison of Photographs to YouTube Video and Patent Applications.⁴
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31 In short, T-Mobile’s extensive disclosure of the component parts and sequencing
 32 algorithm in its patent applications and material presented to the public has destroyed its claimed
 33 trade secret protection. Furthermore, both patent and trade secret protection do not attach to the
 34 same product. *See, e.g., Hickory Specialties, Inc. v. Forest Flavors Int’l, Inc.*, 12 F. Supp. 2d
 35 760, 767 (M.D. Tenn. 1998) (“It is generally accepted that once information is patented, it can no
 36 longer be a trade secret.”). Once a product has been disclosed to the public in a patent
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44 ⁴ The fourth photograph contains an image visible in a portion of the first two photographs and is
 45 inconsequential.

1 application, as it has been here, trade secret protection with respect to that product is necessarily
2 abandoned. As a result, the Court should dismiss Count I of the Complaint.
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5 **C. T-Mobile Failed to Maintain the Secrecy of Its Purported Trade Secret**
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7 In voluntarily disclosing its alleged trade secret, as detailed *supra* I.B, T-Mobile *de facto*
8 fails to meet the second requirement for trade secret protection of undertaking reasonable efforts
9 to maintain its secrecy. RCW 19.108.010(4)(b).
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12 T-Mobile has also failed to plead affirmatively that it undertook the requisite
13 precautionary efforts. Given the lack of particularity discussed *supra* I.A., Huawei USA does
14 not know what T-Mobile is claiming as its trade secret. Nevertheless, T-Mobile's Complaint
15 fails to foreclose the possibility that a T-Mobile employee voluntarily supplied the information to
16 Huawei USA. T-Mobile alleged that "Huawei employees asked T-Mobile personnel detailed
17 questions about the testing robot," and only vaguely stated that "T-Mobile personnel did not
18 provide answers to these [more pointed] questions." Dkt. 1, Compl. ¶ 43; *see also id.* ¶ 44. In
19 explaining the precautionary measures it took, T-Mobile pleaded that it imposed restrictions on
20 *suppliers* who entered its testing lab. *Id.* ¶¶ 11-14. Nowhere did T-Mobile plead that it imposed
21 any measures on its own employees that would have or should have prevented those employees
22 from voluntarily disclosing material to Huawei.
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35 In addition, T-Mobile failed to plead the existence of adequate security measures in place
36 within the laboratory to maintain the secrecy of its alleged trade secrets. *See id.* T-Mobile
37 admits that it allowed Huawei employees access to the laboratory to use the robot and even let
38 Huawei access test results on the computer in the laboratory. *Id.* ¶ 42. T-Mobile alleges that the
39 robot is "hooked up to a computer, which allows the user to change the operation of the robot
40 and record testing results" and that the "robot's operating software is confidential and
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proprietary.” *Id.* ¶ 33. Finally, T-Mobile alleges that “Huawei employees accessed and sent proprietary sequencing files via email to others at Huawei,” *id.* ¶ 62, with the implication being that the files were accessed off the computer in the laboratory. Nevertheless, T-Mobile did not plead the existence of any security measures on the computers in the laboratory, such as even the most basic password or encryption protection on the files allegedly “accessed and sent.”

Because of these failures, as well as the obvious public disclosures delineated above, T-Mobile has not adequately demonstrated that it took reasonable precautionary measures to maintain the secrecy of its purported trade secret; and the Court should, therefore, dismiss Count I of the Complaint.

II. T-MOBILE HAS FAILED TO STATE A CLAIM FOR BREACH OF CONTRACT

A. T-Mobile Has Failed to State a Claim for Damages

An essential element of a breach of contract action is damages. “A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.” *Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (Wash. Ct. App. 1995); *see also Harris v. Seward Park Hous. Corp.*, 913 N.Y.S.2d 161, 162, 79 A.D.3d 425 (2010) (“The elements of such a claim [breach of contract] include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.”).⁵ In its breach of contract claim, T-Mobile has failed to adequately plead damages. “A party cannot recover twice for the same injury

⁵ The Supply Agreement and Clean Room Letter are both subject to Washington law. Ex. 6, Supply Agreement ¶ 9.11; Ex. 7, Clean Room Letter at 1 (“This letter is supplemental to the [Supply Agreement], and is governed by the terms and conditions set forth therein.”). The Non-Disclosure Agreement, however, is subject to New York law. Ex. 8, Non-Disclosure Agreement ¶ 13.

1 simply because he has two legal theories.” *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512,
 2 527, 618 P.2d 1330 (Wash. Ct. App. 1980) (*overruled on other grounds, Barr v. Interbay*
 3 *Citizens Bank of Tampa, Fla.*, 96 Wn. 2d 692, 635 P.2d 441 (Wash. 1981)). And, yet, T-
 4 Mobile’s allegation of damages for its trade secret and breach of contract allegations are
 5 identical, *compare* Compl. ¶ 86 *with id.* ¶ 97. As a result, T-Mobile has stated a claim for double
 6 recovery, and the Court should dismiss Count II.⁶

13 **B. T-Mobile Has Failed to State a Claim for “Other Applicable Agreements”**

14 The Court should also dismiss the allegations related to “other applicable agreements” for
 15 failure to state a claim. T-Mobile alleges that “Huawei USA has materially breached the Supply
 16 Agreement *and other applicable agreements between the parties*,” Dkt. 1, Compl. ¶ 94
 17 (emphasis added), with only this insufficiently pleaded, conclusory allegation. With respect to
 18 “other agreements,” the Complaint has failed to state a claim, as there is no identification of the
 19 individual agreements alleged to have been breached and thus no notice of the contractual
 20 provisions allegedly breached or of the nature of the breach. *See Calixto v. JPMorgan Chase*
 21 *Bank Nat. Ass’n*, No. C13-1153RSL, 2014 WL 30192 (W.D. Wash. Jan. 3, 2014) (dismissing the
 22 complaint for failure to state a claim where plaintiff failed to specify the basis for the alleged
 23 breach according to the terms of the specific contract at-issue); *see also Berman v. Sugo, LLC*,
 24 580 F. Supp. 2d 191, 202 (S.D.N.Y. 2008) (dismissing breach-of-contract claims as conclusory
 25 for, in part, failing to set forth the contract’s major terms); *Arma v. Buyseasons, Inc.*, 591 F.

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 40 ⁶ To the extent that T-Mobile is seeking standalone consequential damages pursuant to paragraph
 41 96 of the Complaint, such damages should be dismissed for violating Rule 9(g) of the Federal
 42 Rules of Civil Procedure: “If an item of special damage is claimed, it must be specifically
 43 stated.” Fed. R. Civ. P. 9(g); *see also, e.g., Marks v. City of Seattle*, C03-1701P, 2003 WL
 44 23024522 (W.D. Wash. Oct. 16, 2003) (striking claim for special damages where the Court
 45 found it “impossible to determine what the special damages alleged would consist of”).

1 Supp. 2d 637, 643 (S.D.N.Y. 2008) (concluding that “bare allegations” were conclusory).

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3 Because T-Mobile has only pleaded that Huawei USA is a signatory to the Supply Agreement,
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5 the Non-Disclosure Agreement, and the Clean Room Letter, Dkt. 1, Compl. ¶ 91, any allegations
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7 with respect to any other agreements referenced vaguely in the Complaint should be dismissed
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9 for failure to state a claim.

10 11 **III. T-MOBILE HAS FAILED TO STATE A CLAIM FOR A PRIVATE CONSUMER** 12 **PROTECTION ACT CLAIM**

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14 T-Mobile’s consumer protection claim fails for three independent reasons: First, T-
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16 Mobile has failed to plead the necessary element of public interest impact. Second, T-Mobile
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18 has failed to plead the necessary element of an unfair or deceptive act or practice. Third, T-
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20 Mobile’s consumer protection claim is preempted by the Washington Uniform Trade Secret Act.

21 22 **A. T-Mobile Has Failed to Plead the Public Interest Element of a Consumer** 23 **Protection Act Claim**

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25 There are five elements a plaintiff must establish for a private Consumer Protection Act
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27 (“CPA”) claim: “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce;
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29 (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and]
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31 (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778,
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33 780, 719 P.2d 531 (Wash. 1986). Failure to plead any single element is fatal to a CPA claim. *Id.*
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35 at 793. T-Mobile has failed to plead the third element, public interest impact, and the Court
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37 should therefore dismiss Count IV of the Complaint.

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39 To meet the pleading requirements of public interest impact, T-Mobile “must show an
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41 impact to public interest *separate and apart* from showing an unfair and deceptive act.” *Nw.*
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43 *Prod. Design Grp., LLC v. Homax Products, Inc.*, 174 Wn. App. 1002, 1002 (Wash. Ct. App.
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45 2013), *review denied*, 178 Wn. 2d 1004, 308 P.3d 641 (Wash. 2013) (emphasis in original). The

1 Washington Supreme Court has recognized the difficulty in pleading public interest impact when
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3 the alleged unfair act pertains to a private dispute: “Ordinarily, a breach of a private contract
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5 affecting no one but the parties to the contract is not an act or practice affecting the public
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7 interest.” *Hangman Ridge*, 105 Wn. 2d at 790.
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9 When the dispute involves a private contract, as it does here, rather than a consumer
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11 transaction, the court evaluates four factors to determine whether the private dispute affects the
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13 public interest: “(1) the alleged acts were committed in the course of the defendant’s business;
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15 (2) the defendant advertised to the consumer public in general; (3) the defendant actively
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17 solicited the plaintiff, indicating its potential to similarly solicit others; and (4) plaintiff and
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19 defendant occupied unequal bargaining positions.” *Nw. Prod.*, 174 Wn. App. at 1002 (citing
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21 *Hangman Ridge*, 105 Wn. 2d at 790-91).
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23 At most, T-Mobile has pleaded facts sufficient to establish only the first of the four
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25 factors, that the alleged acts were committed in the course of Huawei’s business. With respect to
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27 the second factor, the Complaint merely contains a conclusory allegation that “Huawei advertises
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29 to the general public.” Dkt. 1, Compl. ¶ 109. Washington courts have found such a statement in
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31 a pleading utterly insufficient where, as here, the plaintiff failed to plead “a causal connection
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33 between these conclusory allegations and the alleged unfair and deceptive act or practice.” *Nw.*
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35 *Prod.*, 174 Wn. App. at 1002 (affirming dismissal of CPA claim). T-Mobile’s own pleading
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37 belies the third factor. T-Mobile alleged: “Huawei actively solicited T-Mobile’s business
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39 through participation in *T-Mobile’s Request for Proposal process* in which numerous domestic
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41 and international companies competed with Huawei to supply handsets through T-Mobile to the
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43 public at large.” Dkt. 1, Compl. ¶ 109 (emphasis added). T-Mobile therefore concedes that *it*
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1 solicited the business. Huawei simply participated in a competitive bidding process, and T-
 2 Mobile selected Huawei for the business. T-Mobile has failed to plead—and indeed, cannot
 3 plead—solicitation. *See Lafford USA v. Nutreco Holding NV*, No. C03-3897RSM, 2005 WL
 4 1126923, *6 (W.D. Wash. May 10, 2005) (explaining that the fact that “it was plaintiff who
 5 selected defendant for this business” meant that the solicitation factor was not met). Finally, T-
 6 Mobile has omitted mention of the fourth factor, unequal bargaining position, implicitly
 7 acknowledging that it has no basis upon which to plead that Huawei occupied superior
 8 bargaining power.

9 Considering the factors that afford standing for a private company to bring a CPA claim,
 10 T-Mobile has failed to make a sufficient showing. Accordingly, the Court should dismiss Count
 11 IV for failure to state a claim upon which relief can be granted. *Nw. Prod.*, 174 Wn. App. at
 12 1002 (granting motion to dismiss CPA claim); *see also Lafford*, 2005 WL 1126923, *7 (finding
 13 “no basis for a claim under the Washington Consumer Protection Act”).

14 **B. T-Mobile Has Failed to Plead Unfair or Deceptive Act or Practice**

15 Not only has T-Mobile failed to state a claim by failing to plead the public interest
 16 element, but T-Mobile has also failed to plead an unfair deceptive act or practice. The basis for
 17 T-Mobile’s CPA claim is the alleged misappropriation of T-Mobile’s trade secret. T-Mobile
 18 alleges that “Huawei has engaged in unfair practices in violation of the public interest by stealing
 19 the technology of its business partner T-Mobile in violation of a nondisclosure agreement.” Dkt.
 20 1, Compl. ¶ 108. As explained in Section I *supra*, T-Mobile has failed to state a claim for trade
 21 secret misappropriation; therefore, with the basis for the CPA being the alleged trade secret, this
 22 claim should be similarly dismissed. *See, e.g., Hangman Ridge*, 105 Wn. 2d at 793 (explaining
 23 that the failure to allege a single element is fatal to a CPA claim).

C. T-Mobile's Consumer Protection Act Claim Is Preempted by the Washington Uniform Trade Secret Act

The Washington Uniform Trade Secrets Act ("WUTSA") expressly preempts claims for consumer protection when the claims are based on the alleged misappropriation of trade secrets. Here, T-Mobile's consumer protection claim is based upon its trade secret claim; and this Court, therefore, should dismiss Count IV of the Complaint.

WUTSA provides that it "displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret." RCW 19.108.900. A plaintiff "may not rely on acts that constitute trade secret misappropriation to support other causes of action." *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 358, 944 P.2d 1093 (Wash. Ct. App. 1997), *aff'd*, 137 Wn. 2d 427, 971 P.2d 936 (Wash. 1999). Moreover, a court "need not first determine whether the information that [plaintiff] alleges was misappropriated constitutes a trade secret before determining whether [the UTSA] displaces [plaintiff's] common-law claims." *Enterprises Int'l, Inc. v. Int'l Knife & Saw, Inc.*, No. C12-5638 BHS, 2013 WL 6185241, *10 (W.D. Wash. Nov. 26, 2013) (quoting *CDC Restoration & Constr., LC v. Tradesmen Contractors, LLC*, 274 P.3d 317, 330 n.6 (Utah Ct. App. 2012)) (additional citation omitted).

Washington courts have adopted a tripartite analysis to determine whether a claim is preempted: "(1) assess the facts that support the plaintiff's civil claim; (2) ask whether those facts are the same as those that support the plaintiff's UTSA claim; and (3) hold that the UTSA preempts liability on the civil claim unless the common law claim is factually independent from the UTSA claim." *Thola v. Henschell*, 140 Wn. App. 70, 82, 164 P. 3d 524 (Wash. Ct. App.

2007) (citation omitted). “[P]roper application of this three-step analysis precludes duplicate recovery for a single wrong.” *Id.*

According to T-Mobile’s own Complaint, the basis for its CPA claim is that “Huawei has engaged in unfair practices in violation of the public interest by stealing the technology of its business partner T-Mobile in violation of a nondisclosure agreement.” Dkt. 1, Compl. ¶ 108. T-Mobile further alleges that “Huawei’s conduct has the capacity to deceive a substantial portion of the public by passing off T-Mobile’s testing technology as its own and attributing improvements to its devices to its own efforts rather than T-Mobile’s R&D.” *Id.* As is clear from the allegations in the Complaint, T-Mobile has pleaded a consumer protection claim based precisely on the same set of facts for which it is alleging trade secret misappropriation.

Where, as here, the basis for the allegation of a violation of the Consumer Protection Act is the same core set of facts as the misappropriation, the CPA claim must fail. In *Enterprises Int’l, Inc. v. Int’l Knife & Saw, Inc.*, this Court found that “[a]n examination of Plaintiffs’ amended complaint makes clear that they rely on the same set of core facts to support claims for . . . unfair competition pursuant to RCW 19.86, et seq. (Consumer Protection Act (‘CPA’)) . . . as well as their misappropriation of trade secrets claim.” 2013 WL 6185241, *10. Because “the allegations necessary to prove each element still relate to the same core set of facts,” the Court found plaintiffs’ claim for violation of the CPA preempted by the UTSA. *Id.* at *11; *see also Atl. Inertial Sys., Inc. v. Condor Pac. Indus. of California, Inc.*, 545 F. App’x 600, 602 (9th Cir. 2013) (applying the law of California, which has adopted the UTSA, and finding the claim for consumer protection preempted because it relies “‘on the same facts’ as Plaintiff’s statutory claim for misappropriation of trade secrets”). Because T-Mobile’s CPA claim is rooted

1 exclusively in the alleged misappropriation of trade secrets, the Court should dismiss Count IV
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3 as preempted by the WUTSA.
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5 **CONCLUSION**
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7 For the foregoing reasons, Defendant Huawei USA respectfully requests that this Court
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9 dismiss the Complaint against it in its entirety for failure to state a claim upon which relief can
10
11 be granted.
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13 DATED this 27th day of October, 2014.
14

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TO DISMISS COMPLAINT - 24
No. C14-1351 RAJ

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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